No. 10783.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELMER H. MATEAS,

Appellant,

vs.

FRED HARVEY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of the Pleadings and Facts Disclosing the Basis Upon Which It Is Contended the District Court Had Jurisdiction.

In this action the appellant sought to recover damages from Appellee, Fred Harvey Company, a New Jersey Corporation, by reason of injuries sustained when bucked off a mule owned by Appellee, and ridden by Appellant in an excursion pack train in Grany Canyon, Arizona, for which transportation Appellant had paid a fee to Appellee.

The injury occurred June 17, 1942.

The action was filed in the Superior Court of the State of California, in and for the County of Los Angeles on May 28, 1943, numbered 485744.

Appellee made a motion to transfer to the District Court of the United States for the Southern District of Cali-

fornia, Central Division, on September 13, 1943, upon the ground of diversity of citizenship and the amount in dispute being over $3,000.00. [6-7.]

A bond on removal was filed and approved by said Superior Court October 1, 1943. [11-12.]

The order of removal was granted, and a written order therefore made October 1, 1943. [13-14.]

Certificate of the clerk of said Superior Court was filed October 1, 1943.

The action was thereupon transferred to the said District Court of the United States, No. 3179Y Civil, and proceedings thereafter were held in said Court in said action.

Issues were joined [28] on an amended complaint. [16.]

Trial was held January 18, 1944. [27.]

At the close of Appellant's testimony (there being none introduced by Appellee), the Appellee made the following motion [28]:

> "We move for a non-suit and make a motion to dismiss this action, no proof of any breach of any warranty that the mule was of a not fit and proper character * * *." [134.]

After considerable argument the Court made the following order:

> "The motion to dismiss will, therefore, be granted." [138.]

It is from this motion for non-suit and the judgment of dismissal following [29] that this appeal is taken. [30-31.]

Statement of Pleadings and Facts Disclosing That This Court Has Jurisdiction to Review the Judgment in Question.

The rule with relation to non-suits is this:

The party making the motion must specify the grounds, and the Court will consider only those which were so specified.

24 A. C. 77, pages 87 and 88.

The defects of the proof of the plaintiff must be called to his attention so that he may supply the missing evidence if possible.

24 Cal. App. 81.

If a party fails to state the particular grounds upon which the motion is based, it should be denied.

139 Cal. 603;

Brown v. Sterling, 175 Cal. 563, and cases there cited;

Archibald v. Schutz, 14 Cal. App. (2d) 420.

Where an appeal is taken from a non-suit the evidence must be resolved most strongly in Appellant's favor.

Moore v. Steen, 102 Cal. App. 729;

Moore v. Moffett, 188 Cal. 1.

"An appeal may be taken from a Superior Court * * * from a final judgment entered in an action * * *."

Cal. Code of Civ. Procedure 963.

A Concise Statement of the Case Is as Follows:

The Colorado River in Arizona is at the bottom of Grand Canyon, about a mile below the south rim, but some eight miles by a trail four to six feet wide [39] which reaches the river by following the contour of the canyon wall.

Defendant Fred Harvey Company has maintained a hotel and tourist outfit at the south rim of this canyon, at a resort known as El Tovar, for a period of at least 38 years. [38.] As a portion of its service has maintained, and did maintain on the date in question, a number of mules, which were used partly for transportation of "anything" to and from the bottom of the canyon [40] and for excursion parties who were taken to the river as sightseers, up on this trail.

These mules were selected by the defendants' employees [40] and were trained to carry passengers, by having them (the mules) used for a year or two in packing supplies only. [40.] Then they were put on the passenger excursions, not more than ten to a party [43], presided over by a guide, who rode in front (evidently to establish the pace of the troupe).

These mules were kept in a corral, maintained by the Harvey Company, and when a number of persons were gathered at the time established by defendant company for the tour to commence, the corral manager would designate which mule each was to ride.

They rode in single file, and the pace was a walking pace.

Elmer Mateas and his wife came to El Tovar on June 16, 1942. The next day they went to a booth [52] in the hotel where tickets were sold for the mule trip down the

trail. Mr. Mateas told the attendant he had never ridden any mule, or horse [51-2] and the attendant told him in reply that 70% of other persons who had taken the trip had never ridden, either. Mr. Mateas had also received a circular in the hotel, which read in part:

> "Trail Trips Into the Canyon. Although visitors may venture short distances down these trails on foot, the accepted mode of travel for longer journeys is by the famous Grand Canyon mules. These faithful, sure-footed animals, in charge of experienced guides, hold a 30-year record of carrying many thousands of inexperienced riders down the trails and back in perfect safety." [Ex. 1.]

He believed these statements in the circular, and also those of the clerk. [70.] He paid the clerk the necessary fee for the excursion for himself and his wife, and received two tickets. [53.]

The next day, June 17, 1942, he and his wife went to the corral where the mules were. Another party was just leaving, and there were but seven persons left. The trail master pointed out a mule which Mr. Mateas was to ride, and he mounted that mule. [44-45.] He was the last one in the string. Bob Ennis was the guide, a boy about 18 years old. He had been accustomed to horses since he was three—so his father said. He was in front. As Mr. Mateas started out he let the reins lie idle, but was approached by the trail master who told him he must keep them in his hands at all times. [55.]

On the way down the mule ridden by Mr. Mateas would suddenly try to squeeze through the other mules and get over the line, away from the end of the line—try and squeeze through the trail—get in front.

> "He tried to squeeze past the rest of us a number of times—on the drop side of the canyon." [78.]

Indian Gardens is about three and a half miles down—a stopping place both going and coming. [49.]

Before the party reached there, a Mr. Boles who rode the mule immediately in front of Mr. Mateas, discussed the mule situation, and, as Boles was an experienced rider, he offered to change mules.

At Indian Gardens (where the party stopped for lunch) [78] Boles and Mateas traded mules. [58.] Starting from here when they were on the mules, Bob Ennis came back—checking up—and saw they were on different mules.

> "We told him why we had changed—that I could not handle the mule I was on; Mr. Boles said he could handle any mule and we wanted to trade over. Ennis made us return to our original mules." [59.]

> "After we had rested at Indian Gardens I lined up at the water trough; the mules drink before we start off; the mule tried to start off as before, to break loose. [59.] The result was the same as previously. I was told to rein him in, or put him back in the line. A little bit later he ran off, and this time I tried to rein him in and he went into a buck and threw me off." [60.]

> "At the water trough we stopped to water the mules and he (Mr. Mateas) got on another man's mule who was there, and the guide made him exchange mules,

and then when we proceeded his mule tried to get ahead of the rest of ours." [78.]

They exchanged the mules back. "The guide told them to revert to their original mules * * *."

"And we were just rounding, going through a little dip and into a bend, and the mules were struggling, like they are inclined to do, and Bob, our guide, told us to close up the mules, and he stopped at the head to let the mules close up; of course, the rest of the mules stopped, too, and we would try to urge them on a little, and the first thing I heard, I heard someone scream, and I looked up and the girl in front of me, she had a very horror-stricken look on her face; or was, rather, back of me, and I turned around and I heard a lot of commotion was going on I heard at the same time, and I turned around and as I turned I saw the mule bucking with my husband, and I saw two bucks and the second buck he was thrown over the mule's head.

Q. To the left or the right of the mule? A. Directly in front of the mule."

"Just right after the accident Bob Ennis told Mrs. Mateas that this was the first time the mule had been down the trail. [101.]

This particular mule had not carried any passengers in the summer of 1942 before the 17th of June. He had spent the winter months in the company's pasture; this particular trip was his first trip down that year. [130.]

The foregoing statement condensed from the transcript of the record with reference to the respective pages thereto, contains those portions of the testimony to be relied upon by Appellant.

(In addition, there was testimony as to the extent of the injuries sustained by Appellant, which is not material to this appeal.)

Argument and Law Applicable to the Facts.

We assume this Court will take judicial notice of the following facts:

That a horse is not a mule.

That the two animals, being bred differently, have not the same peculiarities of temperament, any more than does an American, as contrasted with a Japanese.

That a horse or a mule, which has been on pasture all winter until the middle of June, has more vim, vigor and vitality than a similar animal which had been working during the same period.

The Harvey Company must have known these same facts, and must have known every fact with regard to this particular mule, when none of the facts were known, or could have been known, to Plaintiff-Appellant.

Many cases have been reviewed by Appellant, in this, and other jurisdictions—all based upon the law relative to livery stable keepers and riding academies.

While the rule of law relating to such types of business is in some degree applicable to the situation before us, the circumstances are radically different.

When a livery stable rents a horse it places that animal immediately and conclusively beyond its control, although in such cases the drive would take place upon a level road, or highway.

In the riding academy cases the animal is also ridden upon a level highway, or road, and is (whether inside a building or out of doors) subject to the control and peculiarities of the rider. The riding academy guide, or teacher, if there was one, has no control over the animal.

In the present case the guide undertook absolute control over all the animals in his charge, and placed himself at the head of them so they must follow his lead.

The conditions differ in other ways from the livery stable cases:

(1) Appellant called to the attention of appellee the fact that he had never ridden either horse or mule, and he was thereupon assured in writing, and by word of mouth, that he would be perfectly safe with whatever animal was selected for him. (2) This particular mule was selected by the employee of Appellee. Appellant had no choice. (3) This trip was not upon a public highway by a wide, smooth, well-travelled road way, but down a steep incline, following the contours of the cliff, and only four to six feet wide.

On one side the perpendicular cliff; on the other a sheer drop of unknown depth. In all, a very dangerous position for an inexperienced rider, unless he is given an extremely gentle, well trained and readily manageable animal.

Much argument has been presented in many cases to the effect that the proprietor of an animal must have knowledge of its incorrect deportment, or vicious disposition, before he can be charged with injuries attendant upon such deportment. This is evidently based upon the old theory that "every dog is entitled to his first bite," a theory which is rapidly being placed in the limbo of obsolete laws. As-

suming, however, that such a rule could be relied upon by Appellee, assuming, also, that the evidence does not show any vicious, improper, or incorrect, mannerisms of this mule *before* he was mounted by Appellant.

Nevertheless, the acts of the mule from that time on, until he bucked Appellant off, shows conclusively that he did not like to be ridden; that he did not intend to be ridden; that he had a nature which was entirely improper for an animal which was to be used in such a hazardous occupation.

It cannot be said that Appellant had any control over this animal, because: Appellant wanted to let the reins loose as he saw other people doing, but on two different occasions was told to hold them tight; and before the party reached Indian Gardens Appellant's mule was insistent upon forcing its way past the mules in front of him, shows that Appellant could not control him.

When the party reached Indian Gardens this condition of lack of control, and the propensity of the mule, was told to the guide—an employee of Appellee.

This desire on the part of the mule to push its way forward was very dangerous—not only to its rider, but to the passengers ahead of it in the string.

If Mr. Mateas' mule pushed between the side of the cliff and the mule ahead of him there was an opportunity to push that forward mule off the trail. If, on the contrary, he tried to pass the forward mule on the left side, he placed himself between the mule ahead and the unprotected side of the cliff—and any movement of the mule so passed might precipitate the passing mule and its rider to their death.

To compel such an inexperienced rider to continue on a mule which had such an intense desire was almost to compel the rider to commit suicide.

Assuming, that the peculiarities of this mule had never before been brought to the attention of any employee of Appellee, nevertheless such propensities were brought directly and definitely to the attention of the guide at Indian Gardens. A Mr. Boles, a member of the party who saw Appellant's continuing danger, and claimed to be an experienced mule rider, offered to exchange mules. Undoubtedly if the guide had permitted this exchange to be made, Appellant never would have been injured. But the guide, knowing these conditions, knowing how the mule had already acted and reacted for nearly half of the way down the canyon, nevertheless insisted that Appellant remain upon this dangerous animal.

If Appellee did not know before that this animal was vicious and dangerous, he knew then. Knowing such danger and insisting that Appellant continue to ride the mule, certainly Appellee brings itself directly within the language of the California Supreme Court in the case of *Clowdis v. Fresno,* 118 Cal. 315 (quoted later.)

(5) That there was an actual or implied *warantee* given by Appellee to Appellant when Appellant purchased his ticket for the excursion, and when he read the advertisement and relied upon it.

> "Plaintiff had a right to assume that repeated assurances of the gentleness of the mule and the team of which the mule was a part, were well-founded and true, notwithstanding that the actions of the mule coming under his observation must have generated in

his mind some suspicions that the animal was not so gentle and tractable as not to require expert watching and handling * * .*"

Fererira v. Silver, 38 Cal. App. 346, 351.

In the ordinary contract of hiring of a horse or mule to be used to ride, the owner of the animal warrants

"against defects or vicious habits which he knows, or by the exercise of proper care could know; and if he fails to exercise such care and it occasions injury to his customer he will not be relieved of liability, though he did not actually know the horse was unsuitable for the purpose * * *."

Dam v. Lake, 6 Cal. 395, page 400;

Kersten v. Young, 32 Cal. App. (2d) 1, page 6.

We have already suggested two instances of evidence supporting this principle of warranty—when the ticket was purchased, and when the ad was read.

(6) That there was a breach of such *warantee* which was brought to the attention of Appellee when the mule ridden by Appellant was skiddish or fractious on the trail, and when Appellant changed mules.

The breach of this warranty occurred as soon as the acts of the mule were brought to the attention of Appellee's employee. When the employee insisted that Appellant continue to ride upon a mule which Appellant himself believed to be dangerous—the liability of the master attached. Even assuming there had been none before.

"In all cases where, by the conducting of any lawful business, the lives and limbs of human beings are placed in peril, the law requires of the proprietor and

managers of that business the utmost care and diligence * * *

"The burden was upon the plaintiffs to prove, in the first instance that he received the injury for which he sought redress; that such injury was done by animals of defendant described in the complaint, and that it happened without fault on his part.

"These facts proved, afforded *prima facie* negligence on the part of defendant, and then the burden of proof became cast on them to show that the injury did not occur by reason of any default on their part."

Ficken v. Jones, 28 Cal. 618, 626.

"The owner of a domestic animal is bound to take notice of the general propensities of the class to which it belongs, and if such propensities are of a nature to cause injury, he must anticipate and guard against them."

Hammond v. Melton, 42 Ill. App. 186.

"All men know that a horse which has been stabled and well fed will, when turned out, run, plunge and become dangerous in the midst of people."

Roberts v. Griffith, 100 Cal. App. 456, 458.

"Common experience justifies the observation that the average work horse or mule, having been thoroughly 'broken' to harness and the ordinary burdens cast upon horses, is so gentle in his relations with those using him for the purpose to which he has been educated—that is, is so bereft of nervousness and of an inclination to become nervous, that the mere blowing of a bag of paper in front of him or near him would have no effect upon him.

"In truth, it is commonly known that a blowing of a steam whistle (etc.) does not disturb in the least the ordinary work horse in these days.

On the other hand, it is well known that the slightest noise or disturbance of any character will often arouse to a high pitch the nervousness of a spirited or high strung horse. Such an animal is generally looking for such trouble from natural fears, he is ready to run or become unmanageable from the slightest cause, which would not disturb the average workhorse. Such animal is naturally wild in disposition, and dangerous, and it is just such a horse that a master should never give over to his servant to use without first acquainting the servant with its dangerous disposition."

Fererira v. Silvey, 38 Cal. App. 346, 352.

"A well established general rule is that the owner of a dangerous or vicious animal who has knowledge that it is such an animal, is liable for any injuries it may inflict upon another, unless such other person voluntarily or consciously does something which brings the injury upon himself.

Heath v. Fruzier, 50 Cal. App. (2d) 598.

A mare hired out by a livery stable, suddenly, without any apparent cause, started to kick violently and ran off.

"He warrants that the horse is not unruly or vicious, but is safe, manageable and suitable for the use for which the customer has hired it * * * in his contract of hiring he impliedly engages that he knows, or has exercised reasonable care to ascertain the habits of his horse, and says to a customer that the horse which he lets is safe and suitable for the purpose * * *."

Con v. Hunsberger, 224 Pa. 154.

"The knowledge by a servant to whom is entrusted the care of the animal is knowledge to a master sufficient to render the latter liable."

Barrett v. Metropolitan, 172 Cal. 112, 119.

"The rule is, however, that a servant's knowledge to whom an animal is entrusted, of its ferocious disposition, is knowledge to the master sufficient to render the latter liable.

Clowder v. Fresno, 118 Cal. 321;

Brice v. Bauer, 108 N. Y. 28;

Cooley on Torts, 406.

(6) That the unreliability of the mule's disposition was twice brought to the attention of Appellee before the time of the injury.

(This point has already been discussed.)

(7) That when Appellee would not permit Appellant to change mules, Appellee became responsible for the results which followed.

(This point has already been presented.)

(8) That when the proprietor of an excursion trip such as this holds out to the excursionist that the apparatus, or animals are safe, and an excursionist *if* thereafter injured without fault on his part, the owner is liable in damages for said injury.

In the following case two employees were driving a six-year-old bull upon a public highway. Twice he had charged. A third time he charged, tossed, and injured plaintiff.

"It is well settled in cases such as this that the owner of an animal, not naturally vicious, is not liable for an injury done by it, unless two propositions are established: First: That the animal is in fact vicious;

and Second: That the owner knew it. Thus if an animal may be of peaceable disposition, while in charge of a master or servant, suddenly and unexpectedly, through rage or fear, inflicts injury, either is responsible, if at the moment he was in the exercise of due care.

"But, conversely, the owner of such an animal knowing its vicious propensities is liable for injury inflicted by it upon property, or upon a person of one who is free from fault.

"Twice before on that very day had the bull evinced its ugly disposition by attacks actual and threatened. Here was ample proof of the fact of viciousness and of the knowledge of that fact brought home to the master."

Clowdis v. Fresno, 118 Cal. 315, 320.

At the outset of the drive, when the men (employees) may be assumed to have believed that the beast was gentle, if it had suddenly and unexpectedly attacked and injured some person, it might well be argued that they were performing their task with due care, and that in an unexpected onslaught the master was not liable.

"But when thereafter while engaged in this undertaking, they acquired knowledge of the animal's evil propensities, it became a question of fact for the jury whether or not they exercised the requisite degree of care in their subsquent management of it. The circumstance that the additional knowledge was acquired by them, and was not known either to them or to their employee in the moment it commenced, would not exonerate the latter.

"If the conductor of a passenger train should at any time during the journey discover a defective wheel, and continuing the trip, injury should result

thereby, the company would not be exonerated because the knowledge was acquired after the train has started.

"Yet there is no difference in principle between the cases, what difference exists is merely in the degree of care exacted by law."

Clowdes v. Fresno, 118 Cal. 315, at 321-322.

(3) That by reason of the fact that the Appellee maintains several strings of mules over a period of many years for the purpose of carrying supplies and excursionists, up and down various trails to and from the south rim of the Grand Canyon, constitute such pack trains public carriers.

(4) That by reason of the circumstances set out in paragraph *111* hereof, the Appellee was an insurer of the safety of all persons carried by said mules on such excursions.

"The rule of law governing in the case under consideration rests for its foundation as that of which the duties and liabilities of the carriers of passengers are governed. * * * 'A' Carrier has to convey his passenger safely and securely; and because of the value of human life and limbs, the law requires the utmost degree of care and skill in the management of the means of conveyance, and will hold the proprietor liable for the slightest negligence."

Ficken v. Jones, 28 Cal. 618, 627.

"A common carrier is one who undertakes generally and for all persons indefinitely to carry goods for hire."

Associated v. Railroad, 176 Cal. 518;

Civil Code 2180, 2191.

The real test between private carrier and common carrier is:

> "Where he is holding out, so long as he has room, to carry for hire the goods of every person who will bring goods to him to be carried."
>
> *Smith v. O'Dell,* 215 Cal. 714, at 718;
>
> *Shannon v. Central School,* 133 Cal. App. 124, at 128.

> "Common carriers are public utilities."
>
> *S. P. v. Railway Commission,* 13 Cal. (2d) 89.

Even a "scenic railway" is a common carrier.

> *O'Callaghan v. Dellwood,* 242 Ill. 336.

> "The liability of the owner is absolute, in such case, and he is bound to keep the animal secure, or he must suffer the penalty for his failure to do so, * * * the gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. In such instances the owner is an insurer against the acts of the animal, and one who is injured without fault, and the question of the owner's negligence is not in the case."
>
> *Opelt v. Al. G. Barnes,* 41 Cal. App. 776, quoted in *Heath v. Faruzier,* 50 Cal. App. (2d) 598.

(We have endeavored to segregate the various points presented, but as they seem to be quite interlaced, it is almost impossible to distinguish where one is sharply distinct from the other.)

Based upon the testimony here given, and the law we consider applicable, we believe the judgment of the learned trial judge should be reversed.

Respectfully submitted,

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